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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,

Petitioners,

vs.

GENE McNARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

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INTEREST OF AMICUS CURIAE

Counsel for the International Association of Assessing Officers has been advised in telephone conversations by the three counsel for the parties to this case that the three counsel each consent to the filing of an *amicus*

brief by the I.A.A.O. Moreover, those three counsel have advised that they have forwarded their written consent to the Clerk of the Supreme Court.

The International Association of Assessing Officers has approximately 8,750 members. Most of the members are employees of state and local governments. The members reside in all fifty states and in other countries. The Association is primarily interested in property tax assessment. The eight objectives of the I.A.A.O. as stated in the I.A.A.O. Constitution, Art. 1, Sec. 2, amended as of June 27, 1980, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearinghouse for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; (8) and to promote justice and equity in the distribution of the property tax burden.

The Association is not a "trade union", but rather, is interested in promoting proper and equitable property taxation. Indeed, the allegations of the Complaint, if true, present an embarrassing situation to assessing officers and notions of fairness in general. The situation should be corrected. We do believe, however, that the doctrine of comity was properly addressed by the district court, and that the taxpayer should be remanded to the state courts if the taxing officials can demonstrate that the state courts will hear federal issues and apply appropriate relief under the Constitution of the United States.

SUMMARY OF ARGUMENT

We submit that the district court was correct in concluding that the doctrine of comity, as espoused in *Younger v. Harris*, 401 U.S. 37 (1971), should be applied to the case at bar. The leading tax case presenting this doctrine is *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). In that case this Court held that the doctrine of comity required the federal district courts to refrain from hearing declaratory judgment actions involving the constitutionality of state and local taxes when there is an available remedy to challenge the constitutionality in state court. The doctrine of comity, in tax cases, evolves from the reluctance, by federal courts, to become involved in the fiscal operations of state and local governments when a remedy may be had in the state courts, with ultimate review by this Court. The theory relies on the fact that state and local tax assessments are complex, are designed to operate according to established rules, and involve the fiscal integrity of state and local governments. Moreover, federal constitutional issues are likely to turn on questions of state tax law. *Perez v. Ledesma*, 401 U.S. 82, 127-128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part). This doctrine of comity, we submit, applies equally to refund actions and damage actions. Accordingly, this Court should hold that federal district courts are required to refrain from hearing Civil Rights actions for tax refunds and damages where the federal right may be preserved and litigated in a state court proceeding.

ARGUMENT

THIS COURT SHOULD HOLD THAT FEDERAL DISTRICT COURTS ARE REQUIRED TO REFRAIN FROM ENTERTAINING CIVIL RIGHTS ACTIONS FOR TAX REFUNDS AND DAMAGES IN CASES INVOLVING ALLEGED WRONGFUL ASSESSMENT OF STATE AND LOCAL PROPERTY TAXES WHEN THE FEDERAL RIGHT MAY BE PRESERVED AND LITIGATED IN A STATE COURT PROCEEDING.

The district court below has held that federal district courts should refrain from hearing Civil Rights actions for refunds of wrongfully assessed local real estate taxes, and/or for damages, if the taxpayer has a remedy to challenge those taxes in state court. The district court relied on both the Tax Injunction Act[1] and the long-standing doctrine of comity in coming to its conclusion. The Eighth Circuit Court of Appeals affirmed by a 4-4 vote, with no opinion. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 478 F. Supp. 1231 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980).

We agree with this holding of the district court and urge this Court to adopt it.

Initially we note that although this Court has on numerous occasions been confronted with the issue of whether or not a federal district court should hear a request for an anticipatory injunction based on an allegedly unconstitutional state or local tax (*i.e. Rosewell v. LaSalle National Bank*, 101 S.Ct. 1221 (1981); *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976); *Holt v. Indiana Man-*

[1] 28 U.S.C. §134 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."

ufacturing Co., 176 U.S. 68 (1900); *Hillsborough v. Cromwell*, 326 U.S. 620 (1946)), this Court has not been squarely presented with the issue of whether or not any particular circumstances require a federal district court to refrain from hearing an action for a tax refund or for damages. We submit, however, that the policy considerations behind this Court's holding in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (that federal district courts should refrain from hearing declaratory judgment actions challenging state and local taxes when there is an available state court remedy), warrants a similar holding that the Complaint at bar was properly dismissed if the taxpayer's federally protected rights may be adequately preserved by the state courts.

The basis of this Court's reluctance to permit federal anticipatory relief was succinctly stated in *Matthews v. Rodgers*, 284 U.S. 521 (1932). In reversing the award of a tax injunction (prior to enactment of the Tax Injunction Act) and holding that the taxpayer had an adequate remedy in state court, it was stated:

> ". . . The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." [284 U.S. at 525.]

Thereafter, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) a taxpayer attempted to adjudicate the constitutionality of a state tax under the Federal Declaratory Judgment Act of 1934. In holding that the district court should have exercised its discretion (319 U.S. at 301) to dismiss the declaratory judgment action, leaving the taxpayer to his remedy in state court, this Court stated that:

> "The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of August 21, 1937 [the Tax Injunction Act], are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the Court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." [319 U.S. at 300-301.]

Importantly, the Court in *Great Lakes* relied not on a statute (i.e. the Tax Injunction Act), but rather on the principle of comity as expressed in *Matthews*. (See *Rosewell v. LaSalle National Bank*, 101 S.Ct. 1221, 1229 n.15 (1981).) Justice Brennan has expressed this doctrine as follows:

> ". . . The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer

> insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." [*Perez v. Ledesma*, 401 U.S. 82, 127-128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part).]

We submit that the doctrine of comity should apply to Civil Rights refund and damage action cases for wrongful state tax assessments such as the one at bar. The doctrine would not thereby be extended in any manner. It is rather the taxpayers who have been, in recent years, significantly extending the scope of relief requested of federal district courts in Civil Rights cases. Taxpayers are attempting to avoid this long-standing doctrine by a semantic reshaping of their cases. It would be a sterile distinction for the Court to hold that, while federal anticipatory relief is inappropriate, a federal district court action for refund and damages may thereafter be allowed.[2] The situations present obverse sides of the same coin. The taxpayer's goal appears to be, not relief from the allegedly unconstitutional assessment, but rather a federal district court hearing

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[2] Indeed, in *Great Lakes*, the Court noted that the Tax Injunction Act was "predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid." 319 U.S. at 301. This is one strand of argument to support the position, which was also adopted by the district court below, that the Tax Injunction Act bars actions such as the one at bar if there is a "plain, speedy and efficient" remedy in the state courts to challenge the tax. See also *Evangelical Catholic Communion, Inc. v. Thomas*, 373 F. Supp. 1342 (D. Vt. 1973), *aff'd mem.*, 493 F.2d 1397 (2nd Cir. 1974); *Advertiser Co. v. Wallace*, 446 F. Supp. 677 (M.D. Ala. 1978); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); and *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979). However, we leave this issue to the parties to brief.

on such issues.[3] Some taxpayers' unfounded distrust of the state courts (assuming that the state courts will hear federal issues) cannot possibly be a proper grounds for permitting actions such as this to proceed in federal district court. State courts are, of course, bound by the Supremacy Clause of the Constitution when adjudicating federal rights. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969). Moreover, as noted by Justice Brennan, the collection of state taxes is done on a "mass" level, in a system designed to operate according to established rules. And constitutional issues are likely to turn on questions of state tax law. *Perez*, 401 U.S. 82, 127-128, n.17. Finally, this Court is always present for review of federal issues. *LaSalle, supra*, 101 S.Ct. 1221, 1230 (1981).

The taxpayer will no doubt suggest that the doctrine of comity has never been applied by this Court to require federal district courts to refrain from hearing Civil Rights damage actions alleging unconstitutional state or local tax assessments. Such damage actions for wrongful tax assessment are, however, a recent innovation. Certain judicial constraints to this general type of lawsuit were lifted relatively recently in *Monroe v. Pape*, 365 U.S. 167 (1961) and *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972). For this reason, this Court is now first considering the issue.

To permit this refund and damage action case to proceed in federal district court may encourage other taxpayers also to circumvent their state court remedies. Such a holding might also encourage taxpayers to bifurcate their claims, and would do little to foster

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[3] And it is clear that the federal district courts' docket is already over-burdened. *Rosewell v. LaSalle National Bank, supra*, 101 S.Ct. 1221, 1232.

comity between the state and federal courts. There is no persuasive reason why taxpayers should have the benefit of being able to select the forum in which the cause will be heard.

The taxpayer in the case at bar may suggest, however, that this *amicus* has presented no standard by which to judge whether or not the state court will preserve the federal rights of which the taxpayer complains. However, if it can be shown that the state courts will hear the federal issues, certainly the state courts would then follow the applicable federal law and award the appropriate federal relief.[4] See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969). Requiring the federal district courts to refrain from hearing this case is merely a procedural restriction, which would in no way effect the taxpayer's substantive rights.[5] The parties could present any and all substantive issues to the state court hearing the case.[6]

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[4] Indeed, the allegations of the Complaint, if true, present a deplorable situation. Assessing newer improvements at a higher level of assessment than older improvements is contrary to Missouri law and a denial of equal protection. The same is true with respect to the alleged practice of targeting for reassessment those property owners who obtain judicial relief. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). And we believe the assessing practices alleged in the Complaint to be "plainly unacceptable", as stated in the International Association of Assessing Officers Treatise, Improving Real Property Assessment (Chicago, 1978). If the allegations of the Complaint are true, appropriate relief is ultimately required.

[5] In this respect there is substantial similarity to this Court's recent holding in *Rosewell v. LaSalle National Bank*, *supra*, 101 S.Ct. 1221, 1228-1234.

[6] The district court opinion in the case at bar gives a superficial discussion of the remedy available in the state courts of Missouri. Since the district court expressly held,

(Footnote continued on following page)

To permit this action to proceed in federal district court would permit that court to initially adjudicate the constitutionality of the tax and/or its assessment. The district court would necessarily be required to issue a judgment declaratory of the merits, squarely in opposition to the principles of comity expressed in *Great Lakes* and in opposition to this Court's holding in that case.[7]

[6] *continued*
inter alia, that the Missouri courts would hear the federal issues, presumably the parties will brief that issue. In any event, we note that the Missouri Supreme Court has expressly held that the courts of that state have jurisdiction to hear federal Civil Rights actions brought pursuant to 42 U.S.C. §1983. *Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. 1978).

[7] See *Evangelical Catholic Communion, Inc. v. Thomas*, 373 F. Supp. 1342 (D. Vt. 1973), *aff'd mem.*, 493 F.2d 1397 (2nd Cir. 1974) for a similar holding.

CONCLUSION

We respectfully conclude that this Court should hold that federal district courts are required by considerations of comity to refrain from entertaining Civil Rights actions for tax refunds and damages involving alleged wrongful assessment of state and local property taxes when the federal rights may be preserved and litigated in a state court proceeding. We, however, take no position as to whether or not the taxpayer has an adequate remedy in the state courts of Missouri, whereby the taxpayer's federal rights may be preserved and litigated, or whether the consideration thereof in the district court was sufficient to support affirmance here, or requires remand for further action.

Respectfully submitted,

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